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APPELLANT PRO SE:

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Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**MICHAEL GENE WORDEN**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL THOMAS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A04-0604-PC-179
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE VANDERBURGH CIRCUIT COURT  
The Honorable Carl A. Heldt, Judge  
Cause No. 82C01-0211-FA-1266

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**April 20, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Michael Thomas (“Thomas”) brings this pro se appeal of the denial of his petition for post-conviction relief.

We affirm.

## ISSUE

Whether Thomas received effective assistance of counsel at trial and on direct appeal.

## FACTS AND PROCEDURAL HISTORY

Following trial by jury, Thomas was convicted of the crimes of attempted murder, as a class A felony, and battery, as a class B misdemeanor, and filed a direct appeal to the Indiana Court of Appeals, which affirmed his convictions by memorandum decision. The facts were as follows:

On November 24, 2002, Thomas and his wife, Madonna, argued about his drug use and financial matters. At one point, the couple’s argument spilled out into the backyard of Madonna’s home; they later went back inside the house. The argument resumed in Madonna’s bedroom, where she kept a gun under a chair cushion. Thomas grabbed the gun and shot Madonna in the back of the head. Madonna ran across the street for help, where she told her neighbors that Thomas shot her. The neighbors summoned help, and an ambulance took Madonna to the hospital.

Thomas fled, but police apprehended him a few days later. He was charged with a number of counts, including the two on which he was tried. Prior to the trial, the prosecutor met with Madonna. At that interview, Madonna stated that Thomas shot her

after the couple argued. At the trial, Madonna was the State's first witness. She admitted that she did not wish to testify against her husband and was present only by compulsion of the subpoena. During her testimony, she testified that she and Thomas were arguing about money. She testified that she grabbed the gun, and it discharged when Thomas tried to get it away from her. In an attempt to impeach her, the prosecutor repeatedly asked if her testimony was consistent with her statements to him in her pretrial witness interview conducted the previous Friday. Thomas's counsel objected at least three times to this line of questioning; the trial court overruled two of the objections and failed to rule on the other.

The jury returned guilty verdicts on the two counts (attempted murder and battery), and the trial court entered convictions against Thomas. On January 12, 2005, Thomas, by counsel, Daniel K. Whitehead, filed an amended petition for post-conviction relief alleging

ineffective assistance of trial counsel in that Mr. [Dennis] Vowels: (1) failed to conduct a reasonable investigation into the facts and law; (2) failed to move to dismiss [the attempted murder count]; (3) failed to object to the Court's final jury instruction #13 [regarding the accident defense]; and (4) failed to object to the Court's final jury instruction #17 [regarding Thomas's right not to testify]. The amended petition also allege[d] ineffective assistance of appellate counsel, Jon Aarstad, for failure to raise any of the above issues on direct appeal.

(Hr. App. 18-19). On January 25, 2005, the State filed its answer to Thomas's amended petition for post-conviction relief. On January 9, 2006, at the post-conviction relief hearing, Vowels cited trial strategy as the basis for his decisions to advance the defense of accident and not to object to the trial court's instructions. Aarstad testified as well,

stating that he did not raise the issue of ineffective assistance of trial counsel because he did not believe that it was merited under the circumstances. Instead, on appeal, Aarstad alleged prosecutorial misconduct, contending that while Madonna testified, the State improperly used hearsay evidence for impeachment purposes and that the trial court had erred when it failed to properly admonish the jury regarding the use of hearsay evidence. Thereafter, at the conclusion of the hearing, the trial court ordered the parties to submit proposed findings of fact and conclusions of law by February 9, 2006, and took the matter under advisement.

On March 7, 2006, the post-conviction court issued its findings of fact and conclusions of law, stating, in pertinent part, the following:

The Court finds that [Vowels'] performance included: a motion to dismiss Count II: Possession of A Firearm By a Serious Violent Felon, which was granted by the Court; motions in limine that were granted by the Court; a motion for a mistrial; a motion to dismiss [the Confinement charge], which was granted by the Court; a motion to dismiss the Habitual Enhancement, which was granted by the Court; an opening statement; cross examination of State's witnesses; closing argument regarding the defense of accident among other themes; five (5) proposed jury instructions tendered by the defense; and all within the time constraints of a "speedy trial" . . . .

. . . . The Court finds that Mr. Vowels subjected the State's evidence and case to meaningful adversarial testing and clearly performed within the objective standards of reasonable performance. Thus, the Court finds that counsel was effective.

**Charging Information For Count I, Attempted Murder, Not Defective**

\* \* \*

The Court finds that the charging information for Count 1, Attempted Murder, provided sufficient detail of the charge to put the defendant on sufficient notice of the nature of the action to prepare a defense. The relevant charging information . . . sufficiently tracks the language of the applicable statute [sic] by providing the date of the incident as well as the

county and State where the incident was alleged to have occurred, the name of the defendant, the name of the victim, the mode of attack, and statutory references. [Vowels] was not ineffective for failing to object to or move to dismiss the charging information in Count I, Attempted Murder, for not including the element of specific intent to kill.

**Trial Counsel's Lack of Objection to Final Jury Instructions #13 and #17 Not Ineffective**

\* \* \*

Final jury instruction #13, regarding the defense of accident, was a 'pattern instruction.' The instruction taken as a whole correctly states the law and adequately instructs the jury, and no prejudice to the defendant occurred due to its use. [Vowels] argued effectively for the defense of accident. Thus, [Thomas] has not sufficiently demonstrated that any objection to final jury instruction #13 would have been sustained and that sufficient prejudice to [Thomas] existed due to its use. Therefore, [Thomas] has not met his burden on this issue.

So too with final jury instruction #17. This instruction concerns [Thomas] not testifying at trial. [Thomas's] allegation [is] that the language in instruction #17, particularly, 'the defendant cannot be compelled to testify,' highlights the fact that [Thomas] chose not to testify. However, final jury instruction #17 goes on to explain that [Thomas's] not testifying 'raises no presumption of any kind against [him] and shall not be commented upon, referred to or in any manner considered by the jury in determining [Thomas's] guilt or innocence.'

Final jury instruction #17 is a correct statement of the law, and, when given, is given for the defendant's benefit. The law does not permit the giving of this instruction over the defendant's objection. Consequently, a defendant has control over whether such an instruction is given to the jury. In the instant case, the giving of this instruction was reasonable trial strategy, and does not constitute ineffective assistance of counsel. [Thomas] has not met his burden on this issue.

**Appellate Counsel Not Ineffective**

\* \* \*

The Court has found that [Vowels] performed effectively regarding all allegations in the amended petition for post-conviction relief. Petitioner now claims that appellate counsel was ineffective for failing to raise on direct appeal the issues discussed and resolved above. Generally, failure to preserve an issue at trial results in waiver of the issue on appeal. Since [Thomas's] trial counsel [Vowels] was effective, and the issues raised in

the amended petition for post-conviction relief were rightfully not preserved at trial, and no fundamental errors occurred, [Thomas's] appellate counsel [Aarstad] was precluded from raising the alleged issues on direct appeal. Consequently, the Court finds that [Aarstad] was not ineffective.

The law is with the State and against [Thomas]. The Court finds that [Thomas] has failed to substantiate his claims and meet his burden of proof in his amended petition for post-conviction relief.

(Hr. App. 22-26). The post-conviction court thereby denied Thomas's amended petition for post-conviction relief, from which order Thomas now appeals.

### DECISION

On the matter of post-conviction relief, we recently noted that

[a] defendant who has exhausted the direct appeal process may challenge the correctness of his convictions and sentence by filing a post-conviction petition. Post-conviction procedures do not provide an opportunity for a 'super-appeal'; rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. Generally, 'complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal.' Post-conviction proceedings are civil proceedings, so a defendant must establish his claims by a preponderance of the evidence.

A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review. The reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Furthermore, while we do not defer to the post-conviction court's legal conclusions, we accept its factual findings unless they are clearly erroneous. To prevail on appeal, the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

*Specht v. State*, 838 N.E.2d 1081, 1086 (Ind. Ct. App. 2005).

Where, as here, the post-conviction court enters findings of fact and conclusions of law, we will reverse only upon a showing of clear error -- one which leaves us with a definite and firm conviction that a mistake has been made. *Oliver v. State*, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006). Upon review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. *Id.* The petitioner is not entitled to a perfect trial, but is entitled to a fair trial, free of errors so egregious that they, in all probability, caused the conviction. *Id.*

Thomas argues that the post-conviction court erred by failing to find that his trial and appellate counsel rendered ineffective assistance.

#### 1. Ineffective Assistance of Trial Counsel

Thomas argues that trial counsel, Vowels, rendered ineffective assistance when he (1) “fail[ed] to challenge the State’s charging information via a motion to dismiss”; (2) “submitted the case upon the affirmative defense of ‘accident’ and alternatively, fail[ed] to object to the court’s final instruction [Number 13] to the defense of accident”; and (3) “failed to object to the court’s final instruction Number 17, which instructed the jury to disregard the fact that the petitioner made the decision not to testify in his own behalf.”<sup>1</sup>

Thomas’s Br. 11, 13.

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<sup>1</sup> Thomas also argues that Vowels rendered “deficient performance” because Vowels (1) “failed to timely begin an investigation and pursue indicated avenues of investigation”; (2) “failed to develop a coherent theory of the case that was legally and factually supported and inherently consistent across the guilt and penalty phases”; and (3) “failed to request dismissal of the attempted murder charge.” Thomas’s Br. 7. However, Thomas fails to present a coherent argument or cite to proper authority in support of these claims. Generally, a party waives any issue raised on appeal where the party fails to develop a coherent argument or provide adequate citation to authority. *See* Ind. Appellate Rule 46(A)(8)(a); *Ketchem v. State*, 858 N.E.2d 255, 255 (Ind. Ct. App. 2006).

We analyze claims of ineffective assistance of trial counsel under the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Law v. State*, 797 N.E.2d 1157, 1161-63 (Ind. Ct. App. 2003). First, the petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Id.* Second, the petitioner must demonstrate that he was prejudiced as a result of his counsel's deficient performance. *Id.* Essentially, the petitioner must show that but for counsel's deficient performance, the result of the proceedings would have been different. *Id.* We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id.* If we can easily dismiss an ineffectiveness claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Id.*

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the petitioner to overcome that presumption with strong and convincing evidence. *Id.* We give deference to counsel's choice of strategy and tactics. *Specht*, 838 N.E.2d at 1087. A petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Law*, 797 N.E.2d at 1162. "And because we presume competence on the part of a lawyer, an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific



evidence as to the performance of the particular lawyer.” *Morgan v. State*, 755 N.E.2d 1070, 1074 (Ind. 2001).

#### A. Attempted Murder Charging Information

First, Thomas contends that the State’s charging information was defective and “fundamentally erroneous” because it “fail[ed] to allege the specific intent to commit murder.” Thomas’s Br. at 11, 8. Thus he argues, Vowels’ failure to challenge the State’s charging information with a motion to dismiss, constituted ineffective assistance of counsel, and “had [Vowels] filed such a timely motion, the motion would have been granted.” *Id.* at 11. We disagree because Thomas cannot show fundamental error.

To constitute fundamental error, the charging information must have so prejudiced Thomas’s rights that a fair trial was impossible. *Truax v. State*, 856 N.E.2d 116, 123 (Ind. Ct. App. 2006). A charging information must merely “advise the accused of the particular offense charged so that he or she can prepare a defense, and so that he can be protected from being twice placed in jeopardy for the same offense.” *Id.*

To further these ends, Indiana Code section 35-34-1-2(a)(4) requires that the information be in writing and allege the commission of an offense by setting forth the nature and elements of the charged offense in plain and concise language without unnecessary repetition.” The information should state the offense in the language of the statute or in words that convey a similar meaning.

*Id.*

Thomas argues that the charging information “fail[ed] to allege the specific intent to commit murder.” Thomas’s Br. at 8. He does not contend that he was misled by the

charging information or that his defense was affected by its wording. Here, the State's attempted murder charging information stated, in relevant part:

The undersigned, being duly sworn upon his oath, says that in Vanderburgh County, State of Indiana, on or about November 24, 2002, Michael S. Thomas, did attempt to commit the crime of Murder, by intentionally shooting against the body of another, to-wit: Madonna Thomas, which conduct constituted a substantial step toward the commission of said crime of Murder, contrary to the form of the statutes in such cases made and provided by I.C. 35-41-5-1 and I.C. 35-42-1-1(1) and against the peace and dignity of the State of Indiana.

(Hr. App. 19).

The charging information provided sufficient facts and detail to adequately apprise Thomas of the charges against him so that he could prepare his defense. It also protected Thomas from being retried for the same offenses, i.e., double jeopardy. The charging information contained the name of the defendant, the place and date of the offense, the name of the charged offense, and the name of the victim. Thomas does not argue that the charging information prevented him from knowing the nature of the charges against him and has failed to demonstrate that the charging information so prejudiced his rights that he was denied a fair trial. Therefore, Thomas has not shown fundamental error.

Because Thomas has not shown that a reasonable probability exists that, but for counsel's failure to challenge the information, the result of his trial would have been different,<sup>2</sup> his ineffectiveness claim must fail. *Law*, 797 N.E.2d at 1161-63. Accordingly,

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<sup>2</sup> Had Vowels filed a motion to dismiss, the State would have had ample time to file a motion to amend aimed at remedying the defect in the information in time for trial. Thomas simply cannot demonstrate that his trial would have ended differently.

we do not find that Vowels rendered ineffective assistance when he did not object to the State's charging information.

#### B. Jury Instruction Regarding Defense of Accident

Thomas argues that Vowels' decision to advance the defense of accident and alternatively, Vowels' failure to object to the trial court's instruction on the accident defense constituted ineffective assistance of counsel. We disagree with both contentions.

Thomas first asserts that the defense of accident was unavailable to him, and that Vowels rendered ineffective assistance by advancing it. He argues, "[I]n the elemental definition of [t]he accident defense, there can be no unlawful act taking place at the time of the incident." Thomas's Br. 13. He reminds us that in addition to being charged with attempted murder, criminal confinement and battery, he was also charged with being a serious violent felon in possession of a firearm at the time of the shooting. Thus, he argues, he could not have satisfied the second element of the accident defense – namely, proving that the act resulting in injury was not an unlawful act. We disagree.

The trial record indicates that before Thomas's jury trial began, Vowels had successfully motioned the trial court to dismiss the count of possession of a firearm by a serious violent felon. Thus, the jury was not made aware that Thomas was a felon, and we reject his contention that the defense of accident was unavailable to him due to his being charged with this offense. Furthermore, as stated above, we give deference to counsel's choice of strategy and tactics. *Specht*, 838 N.E.2d at 1087. A petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Law*, 797 N.E.2d at 1162.

Here, given the evidence presented at trial, an accident defense was certainly a reasonable and adequate defense. Madonna testified that the gun discharged as Thomas tried to get it away from her, adding that Thomas might have been surprised that he had shot her. Further, Madonna repeatedly testified that the shooting “was an accident. . . . [It] was all a bad accident. All of it.” Tr. 76. At the post-conviction relief hearing, Thomas himself characterized the shooting as an accident, saying, “. . . I knew it was [an] accident me myself and she knew it was an accident.” Hr. 55.

Based upon the relevant evidence, there was a material and serious dispute as to whether Thomas intended to kill Madonna. Thus, we find that Vowels did not advance an inadequate or spurious defense – arguably, the accident defense was Thomas’s only viable defense. Because Thomas cannot demonstrate that he suffered prejudice, we find that Vowels did not render ineffective assistance by pursuing the defense of accident.

Second, Thomas claims that Vowels’ failure object to the trial court’s instruction regarding the defense of accident “caused a fundamental error to occur.” Thomas’s Br. 13. Specifically, he argues that the accident defense instruction improperly placed upon him the burden of negating the intent element of attempted murder. Again, we disagree.

To establish ineffective assistance for counsel’s failure to object, a defendant must establish that the trial court would have sustained the objection had one been made and that he or she was prejudiced by the failure to object. *Jones v. State*, 847 N.E.2d 190, 198 (Ind. Ct. App. 2006). Fundamental error occurs when there is a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error denies the defendant fundamental due process. *Guzman v. State*, 857 N.E.2d 28, 28 (Ind.

Ct. App. 2006). To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.*

The trial court's instruction on the defense of accident was a pattern jury instruction at the time of Thomas's trial and direct appeal,<sup>3</sup> and read:

The defense of accident has been raised as an issue in this case. In general, prohibited conduct may be excused when it is a result of accident. This defense contains three elements:

1. The conduct must have been unintentional, or without unlawful intent or evil design on the part of the accused;
2. The act resulting in injury must not have been an unlawful act;
3. The act must not have been done recklessly, carelessly or in wanton disregard of the consequences. The State has the burden of disproving this defense beyond a reasonable doubt. Pattern 10.19.

(Hr. App. 19) (Emphasis added).

Not only did the trial court's instruction state the law correctly, but it also stated explicitly that the State bears the burden of negating the defense beyond a reasonable doubt. Further, in the trial court's other instructions, it repeatedly advised the jury that the State must prove each element of the charged offenses beyond a reasonable doubt. (Tr. App. 72, 88-89). Thomas has not shown that there was fundamental error; nor has he shown that there is a reasonable probability that, but for Vowels' failure to object to the instruction, the result of his trial would have been different. *Jones*, 847 N.E.2d at 197-98. Nor has he demonstrated that sufficient prejudice resulted from the use of this instruction.

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<sup>3</sup> The preferred practice is to use the pattern jury instructions. *Gravens v. State*, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005), *trans. denied*. (citing *Cochrane v. Lovett*, 166 Ind. App. 684, 337 N.E.2d 565, 570 n.6 (1975) (noting that the Indiana Pattern Jury Instructions have the "apparent approval of the Indiana Supreme Court as evidenced by the preferred treatment given such instructions in [Indiana Rule of Trial Procedure 51(E)]").

Thus, we find that Vowels did not render ineffective assistance when he did not object to the instruction regarding the defense of accident.

### C. Jury Instruction Regarding Petitioner's Decision Not to Testify

Next, Thomas argues that Vowels should have objected to the trial court's final instruction stating that the defendant cannot be compelled to testify. He claims that the instruction "highlighted the fact that [he] chose not testify" and might have led jurors to conclude that he was "hiding something." Thomas's Br. 13.

Final jury instruction #17, regarding Thomas's right not to testify, was a pattern jury instruction at the time of Thomas's trial and direct appeal, and reads:

Under the law of the State of Indiana, a person charged with the commission of a crime is a competent witness to testify in his or her own behalf. However, a person charged with the commission of a crime cannot be compelled to testify and is under no duty or obligation to testify. The fact that [Thomas] did not testify raises no presumption of any kind against [him]. It shall not be commented upon, referred to, or in any manner considered by the jury in determining [his] guilty or innocence. *Horan v. State*, 642 N.E.2d 1374 (Ind. 1994).

(Hr. App. at 20). Thomas identifies the clause – "the defendant cannot be compelled to testify" – as being particularly "objectionable," arguing that "[t]here is a high probability that the jury inferred that, had the State been allowed to compel Thomas's testimony, [he] would have incriminated himself." Thomas's Br. 13-14. We disagree.

Again, to establish ineffective assistance for counsel's failure to object, a defendant must establish that the trial court would have sustained the objection had one been made and that he or she was prejudiced by the failure to object. *Jones*, 847 N.E.2d at 198. As stated above, we give deference to counsel's choice of strategy and tactics.

*Specht*, 838 N.E.2d at 1087. We also presume competence on the part of a lawyer, such that an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer. *Morgan*, 755 N.E.2d at 1074. Thomas has not met his burden.

We find that Vowels' decision to ask the trial court to instruct the jury that Thomas was not required or under any obligation to testify was conduct "within the range of reasonable attorney behavior." *Id.* Not only was the giving of this instruction reasonable trial strategy, it also inured completely to Thomas's benefit. We find that Vowels did not render ineffective assistance when he did not object to final jury instruction number 17.

## 2. Ineffective Assistance of Appellate Counsel

Finally, Thomas argues that appellate counsel, Aarstad, rendered ineffective assistance when he failed to raise the claim of ineffectiveness of trial counsel, Vowels.

The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel not only at trial, but during his first appeal as of right. *Seeley v. State*, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003). Our Supreme Court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *See Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001).

When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance. *Seeley*, 782 N.E.2d at 1059. In determining whether

appellate counsel's performance was deficient, we consider the information available in the trial record or otherwise known to appellate counsel. *Id.* The role of appellate counsel should not be measured by information unknown to appellate counsel but later developed after the appeal by post-conviction counsel. *Id.* To prevail upon the claim of ineffective assistance of appellate counsel, the petitioner must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Id.*

When the issue of ineffective assistance of appellate counsel is based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel, the petitioner faces a compound burden. *Id.* Petitioner must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Id.* The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id.*

In order to prevail on this claim, Thomas must demonstrate that Vowels rendered ineffective assistance of counsel, and that Aarstad failed to recognize and raise it on appeal. Given our above findings that Vowels was not ineffective, Thomas cannot establish the elements of ineffective assistance of appellate counsel.

Affirmed.

BAKER, J., and ROBB, J., concur.